No. 80-1416

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MARK J. ROGERS and THOMAS E. BUSH,

Petitioners,

vs.

MYRON L. GORDON, UNITED STATES DISTRICT JUDGE, and ROBERT W. WARREN, UNITED STATES DISTRICT JUDGE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Mr. Rogers' Representation and Fee Requests

Respondent, Judge Myron L. Gordon, appointed petitioner Rogers to represent defendant James Smith, a Menominee Indian, in 78-Cr-157, in which Smith was charged with robbery, false personation, unlawful possession of a firearm, escape, and assaulting an officer of the

Bureau of Indian Affairs. Respondent, Judge Robert W. Warren, appointed Mr. Rogers to represent Smith in a separate case, 78-Cr-158, in which Smith was charged with assaulting a federal officer and theft of property belonging to an Indian tribe.

At least half of the time for which Mr. Rogers sought reimbursement in these two cases was devoted to a Motion to Dismiss the Indictment or to Stay Proceedings, which he filed in both cases. The cases were temporarily consolidated for a decision on this motion, which alleged discrimination against Indians in the selection of grand and petit jurors. Judge Gordon denied the motion in its entirety, ruling that defendants had failed to make a prima facie showing of discrimination. Thereafter, Smith entered into a plea agreement which disposed of the charges in both cases.

Mr. Rogers subsequently requested Judges Gordon and Warren to compensate him for his services in these two cases under the Criminal Justice Act, 18 U.S.C. § 3006A, in an amount in excess of $6,200, plus expenses. Both Judges held that the representation rendered by Mr. Rogers in the cases before them was neither extended nor complex within the meaning of section 3006A(d)(3). Therefore, each Judge approved compensation of $1,000, the statutory maximum, plus expenses.[1]

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[1] Section 3006A(d)(1) provides that attorneys appointed pursuant to the Criminal Justice Act "shall . . . be compensated. . . ." Section 3006A(d)(2) provides that this compensation "shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged. . . ." Section 3006A(d)(3) provides for payment in excess of this amount "for extended or complex representation whenever the court in which the representation was rendered . . . certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the Chief Judge of the Circuit."

Mr. Bush's Representation and Fee Request

Judge Warren appointed petitioner Bush to represent Jean Gristeau, a Menominee Indian, in 78-Cr-161, in which Gristeau was charged with assault and theft. In the course of his representation of Gristeau, Mr. Bush filed a shorter version of Mr. Rogers' motion challenging the jury selection procedures. Gristeau's case was consolidated with Smith's cases before Judge Gordon for hearing on these motions. As noted above, these motions were denied. Thereafter, Gristeau was tried before Judge Warren sitting with a jury. The jury convicted Gristeau of the theft charge after a trial lasting less than two full trial days.

Mr. Bush subsequently requested compensation for his services in an amount in excess of $2,800, plus expenses. Judge Warren held that the representation rendered by Mr. Bush was neither extended nor complex, and therefore awarded Mr. Bush $1,000.

Petitioners' Appeals to the Seventh Circuit

Messrs. Rogers and Bush prosecuted appeals before the Seventh Circuit, contending that Judges Gordon and Warren had erred in refusing to award them fees in excess of the statutory maximum for their services. Both petitioners asserted that the fee awards constituted "final decisions," which the Seventh Circuit had jurisdiction to review under 28 U.S.C. § 1291. Respondents disputed the Seventh Circuit's jurisdiction to hear the appeals. The Seventh Circuit dismissed the appeals for want of jurisdiction, ruling that the refusal to award attorneys' fees in excess of the statutory maximum was not a reviewable order. *United States* v. *Smith*, 633 F.2d 739 (7th Cir. 1980) (R. App. Ex. 1)[2].

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[2] Respondents have submitted a separately bound Appendix with this brief. R. App. Ex. 1 refers to Respondents' Appendix, Exhibit 1.

SUMMARY OF ARGUMENT

I. The Seventh Circuit carefully analyzed the Criminal Justice Act and correctly concluded that Congress did not intend fee awards to be appealable. This conclusion is buttressed by the fact that the procedure by which fee awards are made involves none of the adversarial indicia of judicial proceedings. Given the fact that a decision holding fee awards under the Criminal Justice Act appealable could result in a flood of new appeals that might swamp the courts of appeals and this Court, the Seventh Circuit correctly refused to infer appellate jurisdiction where Congress had not expressly created it.

The thrust of petitioners' argument is that attorneys are undercompensated for their representation of indigents. Petitioners should present this argument to Congress, not this Court. Congress set the hourly rates and maximum fee amounts in the Act, and only Congress can raise them if they are too low.

II. The cases petitioners cite to show the existence of a conflict do not address the issue whether a district court's decision not to award attorneys' fees in excess of the maximum amount set forth in the Criminal Justice Act is a reviewable order. Consequently, there is no conflict among the circuits on this issue. Moreover, the Seventh Circuit's decision does not conflict in principle with cases addressing other issues arising under the Act. Finally, the fact that other attorneys' fee determinations may be appealable is irrelevant to the appealability of fee determinations under the Criminal Justice Act because the provisions of the Act are unique.

III. The procedure and practice of the lower courts in making and reviewing fee awards under the Act are not varied and chaotic. The cases petitioners cite to demon-

strate chaos in the lower courts in fact demonstrate a uniform practice and procedure. There is, therefore, no need for this Court to intervene and set forth guidelines for making and reviewing fee determinations.

IV. The question whether mandamus is an appropriate vehicle for the review of fee awards is not presented in this case because petitioners did not seek a writ of mandamus below. Furthermore, this question is irrelevant to the issue whether an attorney may appeal a fee determination, which depends entirely upon whether Congress intended to make these determinations reviewable. Similarly, this case presents no issue as to the Sixth Amendment rights of indigent defendants because the indigent defendants represented by petitioners received competent assistance of counsel below.

ARGUMENT

I.

THE DECISION OF THE SEVENTH CIRCUIT IS CORRECT AND DOES NOT PRESENT IMPORTANT ISSUES WORTHY OF REVIEW BY THIS COURT.

Congress has provided for the compensation of court-appointed counsel in the Criminal Justice Act, 18 U.S.C. § 3006A(d). Section 3006A(d)(1) authorizes the district courts to compensate appointed counsel "at a rate not exceeding $30 per hour for time expended in court . . . and $20 per hour for time reasonably expended out of court. . . ." In section 3006A(d)(2), Congress has imposed a maximum on the amount of fees the district courts may award appointed counsel: the fees awarded an appointed attorney "shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged. . . ." Section 3006A(d)(3) provides that appointed counsel may receive fees in excess of the statutory maximum "for extended or complex representation whenever the court in which the representation was rendered . . . certifies that the amount of the excess payment is necessary to provide fair compensation. . . ." Section 3006A(d)(3) further conditions payment of fees in excess of the statutory maximum upon approval of the district court's certification by the Chief Judge of the Circuit. Apart from the Chief Judge's approval of excess compensation, the Criminal Justice Act contains no provision for review of fee awards. Similarly, the legislative history of the Act contains nothing indicating that Congress intended fee awards thereunder to be reviewable.

As this Court has held, there is no right to an appeal unless bestowed by statute. *McKane* v. *Durston*, 153 U.S. 684 (1894); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Appellants bear the burden of demonstrating the existence of "that clear statutory mandate" necessary to establish jurisdiction for an appeal. *Curlott* v. *Campbell*, 598 F.2d 1175, 1178 (9th Cir. 1979). The nature of the proceedings below and of the Criminal Justice Act renders fruitless any attempt to establish such a mandate for appeal of district courts' fee awards pursuant to the Act.

Compensation was requested and awarded below in a manner that typifies the procedure under the Criminal Justice Act. After the criminal cases had been resolved in the district courts, and petitioners' services in those courts concluded, petitioners submitted their requests for fees on standardized voucher forms provided for that purpose, without serving copies on opposing counsel. Neither petitioner requested or received a hearing on this matter, and no opposing attorney made, or was given the opportunity to make, any presentation or objections. Both judges responded to the voucher requests by letters not entered on the docket sheets or sent to any other party. None of the indicia of a judicial dispute was present: there was no adverse party, no contested issue, no hearing, and no order was entered compelling the payment of funds by a party before the court.

The structure of the Criminal Justice Act itself underscores the radical differences between the fee determinations and judicial proceedings that are subject to appeal. That no appellate review was contemplated by the drafters of the Act is clear from the complexities that would result from imposing appellate review on the statutory scheme, which calls for approval by the Chief Judge of the Circuit of fees in excess of the statutory maximum. 18 U.S.C. § 3006A(d)(3). For example, had the Seventh Circuit

granted petitioners' requests to remand with directions to certify for excess compensation, the case would return only briefly to the district court before being forwarded to the Chief Judge of the Circuit for approval of the certification that had been ordered by the appellate court. The Chief Judge of the Circuit then would have to review, and possibly disagree with, the decision made by a panel of his own court.

If fee awards were reviewable, a question would arise as to whether the government could appeal a district court's award of excess compensation and what its path to appeal would be. If the government appeals before the Chief Judge reviews the certification, the appeal would create needless duplication and would render the Chief Judge's role frivolous unless the Chief Judge sought to overrule the panel. If the government appeals after the Chief Judge ruled, then a panel of the court would sit in review of its Chief Judge. Even this brief review of the Act highlights the fact that Congress never intended to authorize appellate review of fee awards smaller than the statutory maximum.

The Seventh Circuit carefully studied the Criminal Justice Act. The court stated that the "statutory scheme clearly requires that appropriate awards of compensation are left to the discretion of the court which has had the opportunity to view the proceedings first hand." 633 F.2d at 740. This, coupled with the fact that the Act expressly required review of fee awards in excess of the maximum by the Chief Judge of the Circuit but provided no review for any other fee awards, caused the Seventh Circuit to conclude: "It is, then, the district court which makes the ultimate decision as to the appropriate amount of compensation made within the maximum limit, and any review of the award is confined to that court." 633 F.2d at 741.

The Seventh Circuit also rejected petitioners' efforts to characterize the fee awards as "final decisions" appealable under 28 U.S.C. § 1291. The court described the procedure for awarding fees, which it correctly characterized as "non-adversarial." 633 F.2d at 741. Citing *Brooks* v. *Laws*, 208 F.2d 18 (D.C. Cir. 1953) (non-admission to district court bar not appealable), *Application of L.B. & W. 4217*, 238 F.2d 163 (9th Cir. 1956) (lack of adverse party emphasized in conclusion that licensing determination was not appealable judicial decision), and *In re Jacobi*, 217 F.2d 668 (D.C. Cir. 1954) (lack of hearing emphasized in conclusion that bar admission was not an appealable judicial decision), the court stated that the absence of any "indicia accompanying an adversary proceeding" buttressed its conclusion that fee awards are not appealable judicial decisions.[3]

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[3] Petitioners attack this portion of the Seventh Circuit's decision by citing cases in which other "non-adversarial" determinations are reviewed on appeal: *Roberts* v. *United States District Court for the Northern District of California*, 339 U.S. 844 (1950) (denial of motion to proceed in forma pauperis); *United States* v. *Davis*, 604 F.2d 474 (7th Cir. 1979) (refusal to appoint a specific attorney); *United States* v. *Deutsch*, 599 F.2d 46 (5th Cir.), *cert. denied*, 444 U.S. 935 (1979) (refusal to appoint any attorney based on a determination that the defendant was not indigent). Petition at 30-32. In each of these cases the determination reviewed, though arguably "non-adversarial" in the first instance, directly implicated the constitutional rights of the appellant in the trial proceedings. Consequently, the courts allowed the appellants to prosecute appeals from these determinations. In contrast, as the courts in *Camenisch* v. *United States*, 553 F.2d 1271 (D.C. Cir. 1976), and *Thompson* v. *District of Columbia*, 407 A.2d 678 (D.C. Ct. App. 1979), have held, awarding payment to an attorney on a compensation claim under the Act does not implicate the attorney's Fifth Amendment due process rights or contract rights. Nor does an attorney's fee award implicate the Sixth Amendment rights of the defendant the attorney represents. See pp. 21-22, *infra*.

The Seventh Circuit's refusal to infer appellate jurisdiction where Congress has not expressly created it is particularly appropriate in light of the crushing impact appellate jurisdiction over fee awards would have on the federal courts. During fiscal 1977 alone, the district courts made fee awards under the Act in 21,414 cases.[4] A ruling that fee awards are reviewable on appeal would open the door to a potential flood of appeals that could swamp the already burdened dockets of the courts of appeals.[5]

Petitioners exaggerate the significance of the Seventh Circuit's decision. Petitioners' basis for contending that this case is important is their argument that the present fee rates and maximum fee amounts set by the Criminal Justice Act are too low to guarantee that competent lawyers will undertake to defend indigent defendants. Yet petitioners never explain how an attorney's right to appeal will raise fee awards in the absence of a statutory amendment increasing the Act's hourly rates and maximum fee schedule. Rather, petitioners rely on the dubious assumption that courts of appeals are likely to reverse the discretionary fee awards made by the district courts that observed the representation for which compensation is sought.

Petitioners present their complaints that the Criminal Justice Act's "ridiculously low maximum statutory

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[4] See Exhibit C-1 to Annual Report of Director of the Administrative Office of the United States Courts 1978, submitted to the Seventh Circuit by petitioner Rogers on March 5, 1980 pursuant to the Rule 28(j) of the Federal Rules of Appellate Procedure. (R. App. Ex. 2).

[5] A holding that fee awards are appealable also would have a severe impact on this Court's burgeoning docket. In fiscal 1977, the courts of appeals made fee awards for services rendered on appeal in 1,573 cases. *Id.*

amounts," Petition at 35, result in "gross undercompensation," Petition at 50, to the wrong branch of the federal government. As this Court recently noted, problems with the Criminal Justice Act and the representation of indigent defendants that might be "remedied by adjusting the level of compensation, are questions that can most appropriately be answered by a legislative body acting on the basis of empirical data." *Ferri* v. *Ackerman*, 444 U.S. 193, 205 (1979). Congress, not the courts, has set the fee rates and the maximum fee amounts in the Criminal Justice Act, and only Congress can change them.[6]

Petitioners have attempted to present this Court with problems that do not exist.[7] Respondents agree wholeheartedly with the Seventh Circuit's opinion:

> The history of the American bar is replete with instances of pro bono service by its members. That service has not been undertaken with regard to monetary enrichment, but has been motivated by the higher objective of obtaining equal justice for all, a goal which enriches and strengthen the commonweal. If our holding today discourages those who look upon the Criminal Justice Act as a profit center, so be it. We have not yet reached the day when other members of the

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[6] The 95th Congress considered, but did not enact, legislation which would have increased both hourly rates and statutory maximums by fifty percent. S.1437 and H.R. 6869. See Annual Report of Director of the Administrative Office of the United States Courts 1978, at 562, submitted to the Seventh Circuit by petitioner Rogers on March 5, 1980, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. (R. App. Ex. 2)

[7] Petitioners argue that appointed attorneys may defer to "the desires of the court" rather than represent the interests of their indigent clients zealously because they receive their compensation from the court. Petition at 52-54. Respondents observe members of the bar practice on a daily basis and can assure this Court that the bar has not reached such a sorry state.

> bar will not step forward to take their place, dedicated to the principles of equal justice and competent representation for the less fortunate in our society.

633 F.2d at 741.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

A. The Seventh Circuit Is The First Court To Address The Appealability Of A District Court's Determination That Appointed Counsel Is Not Entitled To Fees In Excess Of The Maximum Set Forth In The Criminal Justice Act.

Petitioners urge, in support of their petition for a writ of certiorari, the purported existence of a conflict among the circuits on whether a court-appointed attorney can appeal a district court's refusal to award fees in excess of the limit set by the Criminal Justice Act, 18 U.S.C. § 3006A(d). Petition at 20.

In fact, no such conflict exists; the Seventh Circuit is the first court to address this issue. Indeed, only one other court of appeals has even mentioned this issue. In *United States* v. *Sullivan*, 456 F.2d 1273 (5th Cir. 1972), court-appointed counsel attempted to appeal the district judge's denial of his request for fees in excess of the statutory maximum in the context of his client's appeal from a conviction. The Fifth Circuit refused to address the question of attorneys' fees in that context: "This appeal does not provide a forum for his appointed attorney's personal financial complaints." 456 F.2d at 1275. Rather than directing counsel to file his own appeal for review of fees, the Fifth Circuit cast considerable doubt on the appealabil-

ity of fee determinations altogether, stating that it declined to "decide whether a trial judge's decision on compensation under this Act is appealable at all." 456 F.2d 1275. See also *United States* v. *Todd*, 475 F.2d 757, 759 n.3 (5th Cir. 1973).

B. The Three Cases Petitioners Cite As Conflicting Do Not Consider The Issue Resolved Below, And Do Not Even Suggest That The Fourth, Eighth, And Ninth Circuits Would Adopt A Rule Of Law Contrary To That Set Forth Below.

Of the three cases on which petitioners rely to demonstrate the existence of a conflict among the circuits,[8] only *United States* v. *Turner*, 584 F.2d 1389 (8th Cir. 1978) (per curiam) is an appeal from a district court's refusal to award fees in excess of the statutory maximum. Although petitioners state that the *Turner* court "assumed jurisdiction," Petition at 21, the court in fact overlooked the jurisdictional issue. The parties neglected to bring the jurisdictional question to the court's attention in their briefs (R. App. Ex. 3), and the court's two paragraph per curiam affirmance of the fee award does not mention the issue of appellate jurisdiction. As this Court has recognized, such *sub silentio* decisions, in which a court never really focuses on an issue, are of limited precedential value concerning that issue. See *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). There is no reason to believe that the Eighth Circuit, if it addressed the question of appealability, would reach a conclusion in conflict with that set forth in the Seventh Circuit's careful opinion below.

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[8] *United States* v. *Turner*, 584 F.2d 1389 (8th Cir. 1978) (per curiam); *United States* v. *Ketchum*, 420 F.2d 901 (4th Cir. 1969); *Botts* v. *United States*, 413 F.2d 41 (9th Cir. 1969).

In *United States* v. *Ketchum*, 420 F.2d 901 (4th Cir. 1969), the district court refused to reimburse court-appointed counsel for expenses "necessarily incurred" in representing his client, 420 F.2d at 904, despite the clear directive of section 3006A(d)(1) that an "attorney shall be reimbursed for expenses reasonably incurred. . . ." The attorney did not appeal this refusal, but mentioned it at the oral argument of the appeal of his client's conviction. The Fourth Circuit, which reversed and remanded the conviction, directed the district court to order reimbursement on remand. 420 F.2d at 904. *Ketchum* is hardly an example of appellate review of a district court's discretionary determination under the Criminal Justice Act that an attorney is entitled to less money than he requested. Moreover, as in *Turner*, the jurisdictional issue resolved below was neither presented by the parties to, nor addressed by, the *Ketchum* court. *Ketchum* does not demonstrate a conflict between the law of the Fourth and Seventh Circuits.

Botts v. *United States*, 413 F.2d 41 (9th Cir. 1969), does not involve the assertion of appellate jurisdiction, even *sub silentio*, over a district court's determination that a court-appointed attorney was not entitled to an award in excess of the statutory maximum. In *Botts*, an appointed attorney who had received no compensation for his services filed suit against the United States under a provision of the Tucker Act, 28 U.S.C. § 1346(a)(2), to recover his compensation. The district court granted the government's motion for summary judgment based upon an affidavit of the Clerk of the District Court stating that the attorney had not submitted the required voucher forms. The Ninth Circuit reversed the decision, holding that the attorney's counter-affidavit stating that he had filed the voucher created a genuine issue of material fact, but instructed the district court to allow the attorney to submit

a new voucher and to compensate him based on the new voucher. *Botts* required the Ninth Circuit to review only a grant of summary judgment that did not present any question as to the propriety of a district court's determination of the amount of fees appointed counsel was to receive. *Botts* provides no basis for assuming that the Ninth Circuit would not follow the opinion of the Seventh Circuit were it asked to review the denial of a request for excess fees under the Criminal Justice Act.

C. The Decision Below Does Not Conflict "In Principle" With Other Cases In Which Courts Of Appeals Have Reviewed Issues Arising Under The Criminal Justice Act.

In addition to asserting the existence of a direct conflict between the opinion below and the decisional authority of other courts of appeals, petitioners contend that the opinion below conflicts in principle with the assertion of appellate jurisdiction over other cases dealing with issues under the Criminal Justice Act. Petition at 24-25. In support of this proposition, petitioners cite *United States* v. *Reddick*, 620 F.2d 606 (7th Cir. 1980), *United States* v. *Sims*, 617 F.2d 1371 (9th Cir. 1980), *United States* v. *Rogalsky*, 575 F.2d 457 (3d Cir. 1978), and *United States* v. *Crim*, 527 F.2d 289 (10th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976).

These cases are wholly inapposite. *Reddick*, *Sims*, and *Crim* are appeals of convicted defendants claiming that they were deprived of their constitutional rights to a fair trial as a result the trial court's refusal to allow funds for expert or investigative services pursuant to section 3006A(e). In *Rogalsky*, the government successfully challenged the authority of the district court under 18 U.S.C. § 4244 to require the Department of Justice to pay the bills

of psychiatrists retained by the Federal Defender for use in preparing and presenting the defense. These cases do not indicate, even inferentially, that an appellate court has jurisdiction over an attorney's appeal of a district court's refusal to compensate him in excess of the statutory maximum.[9]

D. Cases Cited By Petitioners To Demonstrate The Appealability Of Attorneys' Fee Determinations In Other Contexts Are Inapposite To The Case At Bar And Demonstrate No Conflict In The Decisional Authority.

Petitioners further argue that the opinion below conflicts with decisional authority allowing appellate review of attorneys' fee determinations in other contexts. Petition at 27-30. Yet the very first case petitioners cite in this regard, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), wholly undercuts this assertion. In *Alyeska*, this Court emphatically stated that parties and courts may not reason by analogy among statutory allowances of attorneys' fees because they "differ considerably among themselves." 421 U.S. at 260-61. This Court further

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[9] Indeed, *Crim* inferentially supports the opinion below. In *Crim*, the district court authorized payment of the maximum amount of investigative funds allowable under section 3006A(e), but refused to approve funds in excess of that amount. On the appeal of his conviction, the defendant challenged this refusal. The Tenth Circuit ruled: "We cannot reverse a trial court for refusing to authorize the expenditure of investigative funds in excess of the limits prescribed by Congress." 527 F.2d at 296. The court did not discuss its lack of power in jurisdictional terms because the appellant was the convicted defendant. Had the appellant been the investigator seeking more money for his services, however, as the appellants below were the attorneys, the court's lack of power would have amounted to a lack of jurisdiction to hear the investigator's appeal.

highlighted the uniqueness of the Act's attorneys' fees provision by omitting it from an exhaustive compilation of approximately thirty federal statutes allowing awards of attorneys' fees. 421 U.S. at 260 n.33.

The Criminal Justice Act's attorneys' fees provision truly is unique. No other attorneys' fees statute provides a maximum fee allowance and requires the Chief Judge of the Circuit to approve awards in excess of that maximum. Other attorneys' fees statutes, and the cases interpreting them, are therefore irrelevant to the construction of the Criminal Justice Act. The court below was thus correct in following this Court's mandate in *Alyeska* to avoid reasoning by analogy to these provisions.

Similarly, petitioners' argument that the opinion below conflicts with cases in which appellate courts have reviewed determinations of other litigation fees, such as the fee paid a special master, is not persuasive. Petition at 25-27. None of the cases cited by petitioners involve awards of fees subject to the statutory scheme present in the Criminal Justice Act. Consequently, these cases do not supply any reason to presume that fee determinations made pursuant to the Act are reviewable.

III.

THE PROCEDURE AND PRACTICE OF THE LOWER COURTS IN MAKING AND REVIEWING FEE AWARDS ARE NOT CHAOTIC AND THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

Petitioners argue that the procedures followed by the lower courts in making and reviewing awards of fees to appointed counsel are so varied as to be "chaotic." Petition at 34. The careful examination of the cases petitioners

cite in support of this proposition that follows, however, reveals that this chaos is as illusory as the purported conflict between the circuits.

As the primary example of varied practice, petitioners compare *United States* v. *D'Andrea*, 612 F.2d 1386 (7th Cir. 1980), with *United States* v. *Thompson*, 361 F. Supp. 879 (D.D.C. 1973). In *D'Andrea*, the Seventh Circuit held that an attorney could not seek review by the appellate court of the approval by the Chief Judge of Circuit of a fee award smaller than that requested for services rendered before the court of appeals. According to the court, the attorney's remedy, if any, lies in a mandamus action before this Court. Petitioner asserts that in *United States* v. *Boggins*, 489 F.2d 1273 (D.C. Cir. 1974) (unpublished), the Court of Appeals for the District of Columbia reviewed Chief Judge Bazelon's approval in *Thompson* of excess fees awarded by a district court, thus following a procedure different from that described in *D'Andrea*. Petition at 36-37. This assertion is erroneous. As the appended Judgment and Memorandum in *Boggins* show, the D.C. Circuit reviewed only the validity of the defendant's convictions in that case, and not the fee award received by his counsel. (R. App. Ex. 4.) Thus *D'Andrea* and *Thompson/Boggins* do not indicate that the procedure for reviewing fee determinations differs among the circuits.

Similarly, petitioners assert that in *United States* v. *Kingston*, 256 F. Supp. 859 (W.D. Pa. 1966), the Chief Judge of the Third Circuit reviewed a district court's determination not to award compensation in excess of the statutory maximum, despite the fact that the Criminal Justice Act does not authorize such review. Petition at 37. Again, petitioners are mistaken. The district court in *Kingston* had awarded counsel a total fee of $2,055, far

in excess of the then-maximum fee in felony cases of $500.[10] See 256 F. Supp. at 860. Consequently, the Chief Judge was following the letter of the Act in reviewing this fee award. Not surprisingly, petitioners have not cited any case in which a chief judge supposedly has reviewed a district court's determination not to award fees in excess of the statutory maximum.[11]

IV.

THIS CASE DOES NOT WARRANT REVIEW ON WRIT OF CERTIORARI FOR ANY OTHER REASON.

A. The Question Whether Mandamus Is Appropriate As The Sole Remedy For Review Of A District Court's Denial Of Excess Compensation Under The Criminal Justice Act Is Not Presented In This Case.

Petitioners argue at length that mandamus is not an appropriate vehicle for the review of fee awards under the Criminal Justice Act. Petition at 40-47. Yet peti-

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[10] Chief Judge Staley stated that appointed counsel had been compensated for the following number of hours at the then-maximum hourly rates: ". . . 46 hours spent in open court, for which the district judge allowed the maximum rate under the Act of $15 per hour [a total of $690 for time spent in court], and 136½ hours of out-of-court preparation, for which the district judge allowed the statutory maximum rate of $10 per hour [a total of $1365 for out-of-court work]." 256 F. Supp. at 860. Adding the $690 counsel was awarded for court time to the $1,365 for time spent on the case out of court yields a total fee award of $2,055. Chief Judge Staley refused to approve this award and directed the district court to award $500, then the statutory maximum for representation in felony cases. 256 F. Supp. at 861.

[11] The only other cases petitioners cite in their attempt to reveal chaos in the practice and procedure district court fee awards are *Turner*, *Ketchum*, and *Botts*. As discussed above, these cases do not represent any real conflict on this point. See pp. 13-15, *supra*.

tioners have not sought review of their fee awards by writ of mandamus, and the question whether mandamus may be properly used for that purpose was not presented in the appeal below. In fact, the propriety of mandamus for review of fee awards is wholly irrelevant to the question presented by this case: whether Congress, in the Criminal Justice Act, has provided an attorney with the right to appeal a district court's determination that the attorney is not entitled to fees in excess of the statutory maximum under the Act. This Court may not invade the province of the legislature by creating a right to appeal where Congress has not done so. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 271 (1975); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *McKane* v. *Durston*, 153 U.S. 684 (1894).

Because the mandamus issue is irrelevant, respondents will not respond to petitioners' characterization of the availability of that writ in detail. Nevertheless, petitioners have overstated the restrictions on the issuance of a writ of mandamus, and a brief response to this overstatement is necessary. The Criminal Justice Act speaks in mandatory terms in directing the compensation and reimbursement of appointed counsel. *United States ex rel. Bibbs* v. *Twomey*, 538 F.2d 151, 154 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). Consequently, even under the most rigorous standards cited by petitioners, appointed counsel may obtain relief by writ of mandamus where a district court has refused to award any compensation or reimbursement. Moreover, despite petitioners' protestations to the contrary, the courts of appeals do have the power to issue the writ of mandamus to correct gross abuses of discretion. *E.g.*, *Investment Properties International, Ltd.* v. *IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972) (mandamus lies to direct district judge to vacate order restricting discov-

ery); *Dairy Industries Supply Ass'n* v. *LaBuy,* 207 F.2d 554 (7th Cir. 1953) (mandamus lies to direct district judge to reconsider motion to transfer pursuant to 28 U.S.C. § 1404(a) on the basis of proper factors as set forth in the court's opinion). See *United States* v. *D'Andrea,* 612 F.2d 1386, 1388 (7th Cir. 1980) (review of chief judge's approval of fee award lies in a mandamus action in this Court).

The primary objection to use of the extraordinary writs, including mandamus, for the review of fee awards is that they have "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy." Petition at 41, quoting *Ex parte Fahey,* 332 U.S. 258, 260 (1947). Yet petitioners' attempt to appeal these fee awards places two district judges as litigants before this Court, and here, as below, respondents are represented by personal counsel. Furthermore, appeal is not an adequate remedy here because Congrss has not authorized appeals of fee awards under the Act.

Respondents recognize, as did the *D'Andrea* court, 612 F.2d at 1388 n.3, that review is much more difficult to obtain by mandamus than by appeal. Given the overwhelming number of fee awards under the Act, if any procedure is to be used to review these awards it should be the more restrictive procedure of mandamus.

B. This Case Does Not Present A Question Concerning The Sixth Amendment Rights Of Defendants.

Section III of the Petition concerns the Sixth Amendment right of indigent defendants to effective assistance of counsel. Petition at 47-55. Before addressing this

issue, it is important to make clear what the Seventh Circuit's decision does *not* do. It in no way affects the right of a defendant to claim on appeal that he has been denied his Sixth Amendment right to effective assistance of counsel for any reason, including the fact that his attorney could not devote sufficient attention to his case for financial reasons.

Petitioners assert: "It is now likely that indigent defendants are being deprived of effective and competent counsel, in violation of their rights under the Sixth Amendment, given the admittedly low rates provided by the CJA, now that appointed counsel are subject to malpractice liability, and now that denials of excess compensation under the CJA cannot be appealed." Petition at 48. But petitioners do not contend that defendants Smith and Gristeau were denied their right to the effective assistance of counsel. Nothing in the records of their cases indicates that these defendants received anything but competent representation from petitioners Rogers and Bush. In fact, Gristeau appealed her conviction to the Seventh Circuit, but made no claim that she had received ineffective assistance of counsel. See *United States* v. *Gristeau*, 611 F.2d 181 (7th Cir. 1979), *cert. denied*, 447 U.S. 907 (1980).

Earlier this year, this Court stated: "We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law." *Upjohn Co.* v. *United States*, 49 U.S.L.W. 4093, 4093 (1981). Throughout its history, "this Court has followed a policy of strict necessity in disposing of constitutional issues." *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947). One corollary of this policy is that "constitutional issues affecting legislation will not be determined . . . at the instance of one who fails to show that he is injured

by the statute's operation. . . ." 331 U.S. at 569. Even assuming that attorneys have standing to assert their clients' Sixth Amendment rights under these circumstances, petitioners' clients have suffered no injury as a result of the Criminal Justice Act. Consequently this Court is not here presented with the Sixth Amendment issue petitioners attempt to raise.

CONCLUSION

For the reasons stated above, respondents Myron L. Gordon and Robert W. Warren, Judges of the United States District Court for the Eastern District of Wisconsin, respectfully request this Court to deny this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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